84-629

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
Petitioner

v.

ERNEST M. McCOLLUM, AND SMITH BARNEY, HARRIS, UPHAM & CO., INC.,
Respondents

On Writ Of Certiorari To The Supreme Court Of Texas

PETITION FOR WRIT OF CERTIORARI

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45PP

QUESTIONS PRESENTED

1. DOES SECTION 3 OF THE FEDERAL ARBITRATION ACT, 9 U.S.C. § 1, *ET SEQ.*, WHICH SETS OUT PROCEDURES FOR ENFORCEMENT OF THE FEDERAL SUBSTANTIVE RIGHTS CREATED BY THE ACT, APPLY IN THIS STATE COURT PROCEEDING?

2. IF SECTION 3 OF THE FEDERAL ARBITRATION ACT, 9 U.S.C. § 1, *ET SEQ.*, IS NOT APPLICABLE IN THIS PROCEEDING, DOES THE PROCEDURE PROVIDED FOR BY TEXAS LAW IN ENFORCING ARBITRATION AGREEMENTS INSOFAR AS THAT PROCEDURE MAKES AVAILABLE TEMPORARY INJUNCTIVE RELIEF PENDING ARBITRATION VIOLATE THE FEDERAL SUBSTANTIVE POLICIES UNDERLYING THE ACT?

3. IF SECTION 3 OF THE FEDERAL ARBITRATION ACT, 9 U.S.C. § 1, *ET SEQ.*, IS APPLICABLE IN THIS PROCEEDING, DID THE COURTS BELOW PROPERLY CONSTRUE SECTION 3 OF THE ACT TO PRECLUDE ISSUANCE BY THE TRIAL COURT OF A TEMPORARY INJUNCTION PENDING ARBITRATION OF THE ISSUES IN DISPUTE?

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SMITH BARNEY, HARRIS, UPHAM & CO., INC.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

Merrill Lynch, Pierce, Fenner & Smith, Inc.,[1] the petitioner herein, prays that writ of certiorari issue to review the judgment of the Supreme Court of Texas refusing r. view of the judgment of the Court of Appeals of Texas entered in the above-entitled case on February 9, 1984.

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1. Petitioner Merrill Lynch, Pierce, Fenner & Smith, Inc. is a corporation whose parent corporation is Merrill Lynch & Co., Inc. and affiliates or subsidiaries, except wholly owned affiliates or subsidiaries.

OPINION BELOW

The opinion of the court of appeals, reported at 666 S.W.2d 604, appears in Appendix B hereto.

JURISDICTION

The judgment of the court of appeals below was entered on February 9, 1984. A timely petition for rehearing was denied by that court on March 8, 1984. Petitioner's application for writ of error to the Supreme Court of Texas was refused, no reversible error, on June 20, 1984. A timely petition for rehearing was denied by that court on July 18, 1984, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

STATUTES INVOLVED

The pertinent provisions of the Federal Arbitration Act, 9 U.S.C. §§ 2-4 (1976), the Texas General Arbitration Act, TEX. REV. CIV. STAT. ANN. art. 235, §§ G (ii), (iii), (Vernon 1973) and the principal Texas statute regarding injunctions, TEX. REV. CIV. STAT. ANN. art. 4642 (Vernon Supp. 1940) are set forth at Appendix F.

STATEMENT OF CASE

This case arose on October 5, 1983, when Merrill Lynch, Pierce, Fenner & Smith, Inc. (Merrill Lynch), filed suit in the District Court of Harris County, Texas, against Ernest M. McCollum (McCollum) and Smith Barney, Harris, Upham & Co., Inc. (Smith Barney), seeking injunctive and monetary relief. The complaint set out facts alleging, among other things not now relevant, that McCollum, who was once employed by Merrill Lynch

as an account executive, voluntarily terminated his employment with Merrill Lynch to join Smith Barney, a rival investment firm that competes directly against Merrill Lynch. The complaint also alleges that McCollum has contacted Merrill Lynch clients to solicit business and/or the transfer of their accounts from Merrill Lynch to Smith Barney, has removed and taken records from Merrill Lynch in original or duplicate form, and has made use of such records, all of which activities constitute violations of McCollum's employment contract with Merrill Lynch. That contract provides in pertinent part:

> 1. All records of Merrill Lynch, including the names and addresses of its clients, are and shall remain the property of Merrill Lynch at all times during my employment with Merrill Lynch, and that none of such records nor any part of them is to be removed from the premises of Merrill Lynch either in original form or in duplicated or copied form, and that the names, addresses, and other facts in such records are not to be transmitted verbally except in the ordinary course of conducting business for Merrill Lynch.
>
> 2. In the event of termination of my services with Merrill Lynch for any reason, I will not solicit any of the clients of Merrill Lynch whom I served or whose names became known to me while in the employ of Merrill Lynch in any community or city served by the office of Merrill Lynch, or any subsidiary thereof, at which I was employed at any time for a period of one year from the date of termination of my employment. In the event that any of the provisions contained in this paragraph and/or paragraph (1) above are violated I understand that I will be liable to Merrill Lynch for any damage caused thereby.

Paragraph 5 of the same document provides:

> 5. I agree that any controversy between myself and Merrill Lynch arising out of my employment, or the termination of my employment with Merrill Lynch for any reason whatsoever shall be settled by arbitration at the request of either party in accordance with the constitution and rules of the New York Stock Exchange, then in effect.

On October 6, 1983, after hearing arguments of counsel for both parties, the trial court granted and signed a Temporary Restraining Order and Merrill Lynch posted bond.

On October 10, 1983, McCollum filed Defendant's Motion to Quash Temporary Restraining Order, Defendant's Request for Arbitration and Defendant's Plea in Abatement.

Upon request of the trial court, each of the parties filed memoranda of authorities concerning the issues: (1) whether arbitration is proper in this instance and (2) if arbitration is appropriate, whether the court has jurisdiction to grant a temporary injunction pending arbitration.

The Temporary Restraining Order was extended by agreement of the parties and an Agreed Extension of Temporary Restraining Order was signed by the court on October 18, 1983. On October 21, 1983, Merrill Lynch's application for temporary injunction came on for hearing. Prior to the presentation of any evidence, however, the court ruled from the bench that all of Merrill Lynch's complaints against McCollum and Smith Barney (as contained in Merrill Lynch's pleadings) were matters to be arbitrated under the Federal Arbitration Act, and that therefore, as a matter of law, the trial court lacked

authority to conduct a temporary injunction hearing or to grant a temporary injunction. The trial court made this ruling without allowing Merrill Lynch the opportunity to present any evidence, but Merrill Lynch's counsel was allowed to make an "Offer of Proof" pursuant to Rule 103, Texas Rules of Evidence, as to what the testimony would have been had the court allowed Merrill Lynch's evidence. In its Order Denying Temporary Injunction, the trial court denied such as a matter of law, but also held that if Merrill Lynch's evidence at the temporary injunction hearing had been in accord with its Offer of Proof, Merrill Lynch will have made a *prima facie* case for issuance of a temporary injunction.[2] Thereafter, on the same day, the trial court signed an "Order Compelling Arbitration and Staying Case" pending completion of arbitration.[3]

From the trial court's "Order Denying Temporary Injunction" and "Order Compelling Arbitration and Staying Case," Merrill Lynch prosecuted an appeal. Among its points of error, Merrill Lynch assigned as error the trial court's holding, as a matter of law, that Merrill Lynch's Application for Temporary Injunction must be denied without allowing an evidentiary hearing, because the trial court based such decision on the erroneous conclusion of law that the court was without legal authority to issue a temporary injunction. On February 9, 1984, the Fourteenth Court of Appeals rendered an opinion affirming the trial court decision and held in short (1) that each count pled by Merrill Lynch is subject to arbitration and (2) that by virtue of 9 U.S.C. § 3, the trial court is without legal authority to issue a temporary injunction pend-

2. Appendix D, p. 17a.

3. Appendix E, p. 19a.

ing arbitration.[4] A Motion for Rehearing raising the same points of error as those raised on appeal was timely filed and denied by that court on March 8, 1984.[5]

Points of error questioning the validity of the court of appeals' interpretation of the Federal Arbitration Act, with specific reference to 9 U.S.C. § 3, and thus its holding that the trial court was without legal authority to entertain and issue a temporary injunction pending arbitration, were raised in Petitioner's Application for Writ of Error to the Supreme Court of Texas, which refused the application stating there was no reversible error.[6] A Motion for Rehearing was timely filed and denied by that court on July 18, 1984.[7] Petitioner seeks a writ of certiorari in light of the erroneous construction given by the state courts below of the Federal Arbitration Act and its application in state court proceedings.

REASONS FOR GRANTING WRIT

The decision below is wrong as a matter of statutory construction. Although a temporary injunction is involved in this case, the "abuse of discretion" standard is not applicable. The question in this case is whether the trial court and Texas appellate courts were correct in holding that the Federal Arbitration Act ("the Act") withdraws a state court's legal authority to issue a temporary injunction pending arbitration of disputes arbitrable under the Act. Petitioner respectfully submits that the lower courts have erroneously decided important federal questions con-

4. Appendix B, p. 3a.
5. Appendix C, p. 16a.
6. Appendix A, p. 1a.
7. Appendix A, p. 2a.

cerning the proper interpretation of the Act and its application in state court proceedings.

I.

It is clear from this Court's decision in *Southland Corp. v. Keating*, ____U.S.____, 104 S.Ct. 852, 858 (1984), that Congress, in enacting the Federal Arbitration Act, created a substantive rule applicable in state as well as federal courts mandating the enforcement of arbitration agreements. A state statute attempting to undercut that mandate would be preempted by the Act. *Id.* at 861. However, beyond this conclusion, which is compelled by the language of Section 2 of the Act,[8] it is by no means clear that Congress intended the preemptive effect of this statute to be so unyielding as to deprive states from fashioning and applying their own procedures to enforce that federally created right.

Sections 3 and 4 of the Act[9] purport to provide the procedural mechanisms for enforcing the Act. However, those sections by their express terms apply only to the federal courts. This Court stated in its opinion in *Southland Corp. v. Keating*, that "[i]n holding that the Arbitration Act preempts a state law that withdraws the power to enforce arbitration agreements, we do not hold that Sections 3 and 4 of the Arbitration Act apply to proceedings in state courts." *Id.* at 861 n. 10. Accordingly, this Court in *Southland* expressly reserved for future decision the question whether Sections 3 and 4 of the Act are applicable in state court proceedings.

The courts below held that the state trial court had no legal authority to grant temporary injunctive relief

8. Appendix F, p. 21a.
9. Appendix F, pp. 21a-22a.

pending arbitration by virtue of the mandatory terms of Section 3 of the Federal Arbitration Act. Petitioner submits that the lower courts erred in applying Section 3 in this state court proceeding. While state courts are without power to detract from "substantive rights" created by Congress, they have always been permitted to apply their own reasonable procedures when enforcing those rights absent specific direction from Congress to the contrary. *Southland Corp. v. Keating,* 104 S.Ct. at 869 (O'Connor, J., dissenting); *Minneapolis & St. Louis Railroad Co. v. Bombolis,* 241 U.S. 211, 221-222 (1916). There is nothing in the legislative history of the Act that would suggest that Congress intended state courts to apply federal procedures in place of their own for the enforcement of the federal right created thereunder. Petitioner respectfully submits that Section 3 has no application in this state court proceeding, and that the Texas courts erred in holding to the contrary.

As noted by this Court in *Southland,* "the overwhelming proportion of all civil litigation in this country is in the state courts." *Id.* at 860. Until the applicability of Section 3 of the Act in state court proceedings is resolved by this Court, confusion and uncertainty will reign in the state courts as to the proper procedural law applicable in enforcing the Federal Arbitration Act. The present case squarely presents this Court with an opportunity to resolve this important question of federal law which was expressly reserved in *Southland.*

II.

Petitioner acknowledges that if it is correct in its contention that Section 3 of the Act is inapplicable in state proceedings, the procedures provided for by state law

(which would then be applicable) nonetheless must not undermine the federal substantive rights created by Congress. Otherwise, state law will be preempted by the Act. *Southland Corp. v. Keating,* 104 S.Ct. at 861. Utilizing this analysis, an additional question must be addressed in determining the availability in this case of temporary injunctive relief pending arbitration: Does the Federal Arbitration Act preempt Texas procedural law to the extent it allows temporary injunctive relief pending arbitration?

It is clear that Texas procedural law makes available temporary injunctive relief pending arbitration. The Texas legislature has passed a specific statute authorizing such relief. *See* TEX. REV. CIV STAT. ANN. art. 235 (G)(ii) and (iii) (Vernon 1973)[10] Furthermore, in a case such as this where a lawsuit has actually been initiated, temporary injunctive relief is available pursuant to the principal Texas statute governing injunctions, TEX. REV. CIV. STAT. ANN. art. 4642 (Vernon 1940).[11] The question is whether the Federal Arbitration Act and the substantive federal rights created thereunder preempt these injunction statutes to the extent they make available temporary injunctive relief pending arbitration of disputes arbitrable under the Act.

As this Court recently observed in *Silkwood v. Kerr-McGee Corp.,* ____U.S.____, 104 S.Ct. 615, 621 (1984),

> State law can be preempted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted. If Congress has not entirely displaced

10. Appendix F, p. 23a.

11. Appendix F, p. 24a.

> state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

Although in *Southland Corp. v. Keating,* 104 S.Ct. at 861, an examination of the statutory scheme and legislative history of the Federal Arbitration Act convinced this Court that "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements," there is nothing in that statutory scheme or legislative history which would suggest that Congress intended to exclude all state regulation of arbitration agreements. Accordingly, the first branch of the preemption test is not satisfied. The remaining question is whether the availability of temporary injunctive relief conflicts with the substantive law created in the Federal Arbitration Act.

The Federal Arbitration Act does not expressly prohibit a trial court from issuing a temporary injunction pending arbitration. Accordingly, there is no impossibility of compliance with both state and federal law. Furthermore, the Texas injunction statutes as applied to pending or prospective arbitration proceedings do not stand as an obstacle to the accomplishment of the full purposes and objectives of Congress. In enacting the Federal Arbitration Act, Congress declared a national policy favoring enforcement of arbitration agreements. *Id.* at 858. Availability of the temporary injunction remedy will not hinder the arbitration process but will merely allow the status quo to be preserved pending resolution of the

dispute in arbitration. There is no indication that Congress even considered precluding the use of provisional remedies in instances such as this where at the early stage of arbitration, when preliminary relief is most needed, there are no arbitrators to whom application for injunctive relief can be made.

Finally, as Justice Stevens recently noted in the context of the Federal Arbitration Act, "[t]he exercise of State authority in a field traditionally occupied by State law will not be deemed preempted by a federal statute unless that was the clear and manifest purpose of Congress." *Southland Corp. v. Keating,* 104 S.Ct. at 862 (Stevens, J., dissenting), *citing, Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 157 (1978). There is nothing in the Act or its legislative history that suggests that it was "the clear and manifest purpose of Congress" to preclude issuance by state courts of temporary injunctions pending arbitration of issues arbitrable under the Act to preserve the status quo pending arbitration. As a result, the Act should not be so construed.

The importance of this question is demonstrated by the differing results reached in the supreme courts of the various states on the question whether temporary injunctive relief is available pending arbitration of issues arbitrable under the Act. Specifically, in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. District Court, City and County of Denver,* 672 P.2d 1015 (Colo. 1983) and *American Eutectic Welding Alloys Sales Co., Inc. v. Flynn,* 161 A.2d 364 (Pa. 1960), the supreme courts of Colorado and Pennsylvania expressly held that the temporary injunction mechanism is available to preserve the status quo pending arbitration, even in the face of a valid arbitration agreement, while in this case, the lower

courts determined that temporary injunctive relief pending arbitration is unavailable. Petitioner respectfully submits that this Court should resolve the issue whether the temporary injunction mechanisms made available in state court proceedings under state law are preempted by the Federal Arbitration Act as applied to pending or prospective arbitration proceedings, and thereby resolve any uncertainty in the proper interpretation of that Act as applied in the state courts.

III.

In the event Section 3 of the Federal Arbitration Act applies in state court proceedings, the question is whether Section 3 (which governs enforcement of the Act) precludes a trial court from issuing a temporary injunction pending arbitration. In holding that the trial court had no legal authority to issue a temporary injunction pending arbitration, the court of appeals in this case relied on that portion of Section 3 providing that if the court is satisfied the dispute is arbitrable, "the court . . . shall . . . *stay the trial of the action* until such arbitration has been had. . . ." 9 U.S.C. § 3 (emphasis added). Petitioner respectfully submits that the state courts below have erroneously construed Section 3 of the Act.

The court of appeals in this case interpreted the phrase "stay the trial" very broadly, holding that that language prohibits all further proceedings before the trial court upon that court's determination that the issues involved in the dispute are arbitrable.[12] There is, however, no reason for such an expansive reading of the statutory language. The purpose of a temporary injunction is to

12. Appendix B, p. 11a.

preserve the status quo pending a final resolution on the merits. Availability of the temporary injunction mechanism pending arbitration does not affect final resolution of the dispute *in arbitration*. Accordingly, use of the temporary injunction mechanism pending arbitration in no way impedes the substantive federal policy behind the Federal Arbitration Act that arbitration agreements shall be enforced.

Furthermore, it is important to note that at least until an arbitration panel has been appointed to hear a particular case, and most likely even after such appointment, there is no forum (other than the courts) in which relief may be sought to preserve the status quo pending final resolution of the disputes in arbitration. In fact, this Court has specifically recognized the problem of "the unavailability of equitable relief in the arbitration context." *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 253 (1970). Under the court of appeals' interpretation of Section 3, there would be a period of time during which the claimant would have no forum in which to seek preservation of the status quo. Petitioner respectfully submits that Congress could not have intended the "stay the trial" language of Section 3 of the Act to strip a claimant of the only procedure available to prevent irreparable harm resulting from the other party's actions. The concept of "irreparable harm" by definition entails harm which cannot be compensated by way of monetary damages. Section 3 should not be construed to preclude a claimant from preventing irreparable harm and preserving the status quo until the dispute can be finally resolved *in arbitration*.

The important role of the injunction pending arbitration has previously been recognized by this Court. In

Boys Market, Inc. v. Retail Clerks Union, Local 770, 398 U.S. at 246, this Court described the injunction as an "important . . . remedial device, particularly in the context of arbitration." Yet the construction given to Section 3 by the courts below would make injunctions pending arbitration *totally unavailable*. The statutory phrase "stay the trial" should not be stretched to yield such an undesirable result.

Petitioner submits that its construction of Section 3 is also consistent with principles of federal statutory construction relating to preemption of state law. Specifically, as noted above, this Court has held that state authority in a field traditionally occupied by state law will not be deemed preempted by a federal statute unless that was the clear and manifest purpose of Congress. *Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 157 (1978); *Southland Corp. v. Keating,* ____U.S.____, 104 S.Ct. 852, 862 (1984) (Stevens, J., dissenting). Yet if the court of appeals' interpretation of Section 3 is correct, that Section preempts the injunction laws of each and every state as applied to disputes which are arbitrable under the Federal Arbitration Act. It is neither "clear" nor "manifest" that this was the result which Congress intended. Petitioner respectfully submits that Section 3 should be construed in harmony with the temporary injunction statutes of the states and as not precluding the issuance by state trial courts of temporary injunctions pending arbitration.

This question of statutory construction is of critical importance due to a split in the United States Circuit Courts of Appeals. Specifically, in *Erving v. Virginia Squires Basketball Club,* 468 F.2d 1064 (2d Cir. 1972)

and *Sauer-Getriebe KG v. White Hydraulics, Inc.,* 715 F.2d 348 (7th Cir. 1983), the Second and Seventh Circuits held that although a dispute is arbitrable under the Federal Arbitration Act, a trial court has the power to issue a temporary injunction pending arbitration. However, in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey,* 726 F.2d 1286 (8th Cir. 1984) and *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Scott,* No. 83-1480 (10th Cir. May 12, 1983) (not reported), the Eighth and Tenth Circuits held that temporary injunctive relief pending arbitration is not available in connection with a dispute arbitrable under the Federal Arbitration Act. Petitioner respectfully submits that this Court should review the decision below to resolve the split in the Circuits concerning the availability of temporary injunctive relief pending arbitration under Section 3 of the Federal Arbitration Act.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

KENNETH E. JOHNS, JR.
VINSON & ELKINS
3215 First City Tower
Houston, Texas 77002-6760
(713) 651-2628

October 15, 1984

CERTIFICATE OF SERVICE

I, Kenneth E. Johns, Jr., a member of the Bar of the Supreme Court of the United States and counsel of record for Merrill Lynch, Pierce, Fenner & Smith, Inc., Petitioner herein, hereby certify that on October 15, 1984, pursuant to Rule 28, Rules of the Supreme Court, I served three copies of the above and foregoing Petition For A Writ Of Certiorari To The Supreme Court Of Texas on each of the parties herein, as follows:

On Ernest M. McCollum and Smith Barney, Harris, Upham & Co., Inc., Respondents herein, by depositing such copies in the United States Post Office, Houston, Texas, with first class postage prepaid, properly addressed to the post office address of Mark C. Watler, the above-named Respondents' counsel of record, at Woodard, Hall & Primm, 4700 Texas Commerce Tower, Houston, Texas 77002.

All parties required to be served have been served.

Dated October 15, 1984.

KENNETH E. JOHNS, JR.
VINSON & ELKINS
3200 First City Tower
Houston, Texas 77002
(713) 651-2628

APPENDIX A

IN THE SUPREME COURT OF TEXAS

No. C-2953 June 20, 1984

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.

v.

ERNEST M. McCOLLUM ET AL.

From HARRIS County,

FOURTEENTH District.

Application of petitioner for writ of error to the Court of Appeals for the Fourteenth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, Merrill Lynch, Pierce, Fenner & Smith, Inc., and its surety, Federal Insurance Company, pay all costs incurred on this application.

No. C-2953 July 18, 1984

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.

v.

ERNEST M. McCOLLUM ET AL.

From HARRIS County,

FOURTEENTH District.

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Austin, this, the 19th day of July, 1984.

GARSON R. JACKSON, Clerk

By /s/ FRITZI BORN, Deputy.
Fritzi Born

APPENDIX B

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
Appellant,

v.

Ernest M. McCOLLUM, and
Smith Barney, Harris, Upham & Co., Inc.,
Appellees.

No. B14-83-731CV.

Court of Appeals of Texas,
Houston (14th Dist.).

Feb. 9, 1984.

Rehearing Denied March 8, 1984.

Kelly J. Coghlan, Vinson & Elkins, Houston, for appellant.

Mark C. Watler, Woodard, Hall & Primm, Houston, for appellees.

Before ROBERTSON, SEARS and ELLIS, JJ.

OPINION

ROBERTSON, Justice.

This is appeal from the trial court's: (1) denial of appellant's application for temporary injunction, (2) granting an order compelling arbitration and (3) staying the case pending completion of arbitration. Appellant

raises five points of error complaining of the trial court's denying the temporary injunction "as a matter of law, without allowing an evidentiary hearing," considering "unreported and not to be reported case authority," and granting the order to stay the case and compel arbitration since a state court is "not granted the authority under the Federal Arbitration Act to compel arbitration." We affirm.

Appellee, Ernest McCollum ("McCollum"), on or about February 20, 1979, began his employment with appellant Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"). Both parties signed an Account Executive Training Agreement and Account Executive Agreement, having identical clauses regarding post-employment solicitation of Merrill Lynch clients and post-employment use of books and records of Merrill Lynch. On or about August 9, 1983, McCollum voluntarily terminated his employment with Merrill Lynch and on or about the same day commenced working for appellee Smith Barney, Harris, Upham & Co., Inc., ("Smith Barney"). Merrill Lynch, in its First Amended Original Petition and Application for Temporary Restraining Order, Temporary Injunction and Permanent Injunction, brought four "counts:" "Illegal Disclosure and Use of Trade Secrets," "Tortious Interference with Contractual and Business Relations," "Contractual Violations of McCollum," and "Unjust Enrichment." In the body of its petition, Merrill Lynch alleged that McCollum has "contacted Merrill Lynch clients to solicit business and/or the transfer of their accounts from Merrill Lynch to Smith Barney, . . . removed and taken records of Merrill Lynch . . . in original or in duplicated form and has made use of such records, . . . tortiously interfered with the con-

tractual relations between Merrill Lynch and its customers, . . . and encouraged and enticed Merrill Lynch brokers and other personnel to breach their employment contracts with Merrill Lynch." Merrill Lynch alleged that Smith Barney had reason to know of the employment agreements and their terms and that Smith Barney encouraged McCollum in his actions.

Four of appellant's points of error concern the trial court's denial of temporary injunctive relief. Merrill Lynch sought a temporary injunction enjoining appellees from further use of confidential information and further solicitation of Merrill Lynch clients. The trial judge, in denying the application, at least in part, relied on the court's finding that all matters pled by appellant were subject to arbitration. In its first point appellant contends that the trial court erred in finding all matters pled subject to arbitration. We disagree.

First, the trial court had to decide whether an agreement to arbitrate existed, and if so, whether the matters pled by Merrill Lynch came within that agreement. Paragraph 1 & 2 of the Account Executive Agreement proscribe many of the acts which McCollum is accused of committing.

> All records of Merrill Lynch including the names and addresses of the clients, are and shall remain the property of Merrill Lynch at all times during my employment with Merrill Lynch and after termination for any reason of my employment with Merrill Lynch, and that none of such records nor any part of them is to be removed from the premises of Merrill Lynch either in original form or in duplicated or copied form . . .

> In the event of termination of my service with Merrill Lynch for any reason, I will not solicit any of the clients of Merrill Lynch for any reason, I will not solicit any of the clients of Merrill Lynch whom I served or whose names become known to me while in the employ of Merrill Lynch, or any subsidiary thereof at which I was employed at any time for a period of one year from the date of termination of my employment . . .

Paragraph 5 of the same document provides:

> I agree that any controversy between myself and Merrill Lynch arising out of my employment, or the termination of my employment with Merrill Lynch for any reason whatsoever shall be settled by arbitration at the request of either party in accordance with the constitution and Rules of the New York Exchange, then in effect.

[1] Merrill Lynch argues that not all of the matters pled are arbitrable since some took place after McCollum terminated his employment with Merrill Lynch and are founded in tort; consequently, they do not come within the parties arbitration agreement which covers controversies "arising out of my employment or the termination of my employment." It cites *Coudert v. Paine Webber Jackson & Curtis*, 705 F.2d 78 (2d Cir. 1983) for this proposition. In *Coudert*, a registered representative sued her former employer brokerage firm claiming defamation, invasion of privacy and intentional infliction of emotional distress. In reversing the trial court, the appellate court held "rather, the dispute itself does not pertain to employment or termination of employment; the tortious acts are all claimed to have occurred after such termination." *Id.*, at 82. Merrill Lynch would have us hold that the *timing* of the alleged controversial acts

are determinative of whether the controversy "arises out of employment or termination of employment." We refuse to so hold. We believe *Coudert* should be limited to its facts in that the post-employment controversy concerned tortious conduct alone, not violations of the parties employment agreement such as the case before us. We find support for our position in *Downing v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 725 F.2d 192 (8th Cir. 1984). "In the present case, the temporal aspect is an inevitable consequence of the contract clause in issue." *Id.*, at 195. We believe the proper approach to be an inquiry as to whether the subject matter of the complaints arose out of the parties employment agreement or termination of employment. The mere timing of the controversial acts should not be controlling. In the case at bar Merrill Lynch argues that the express terms of the employment agreement were violated, but since these alleged violations took place after the employee-employer relationship terminated, the controversy does not arise out of employment or termination of employment. We cannot accept this argument.

Merrill Lynch and Smith Barney are members of the New York Stock Exchange and McCollum is a registered representative of the exchange. There is substantial authority for the proposition that, irrespective of the parties employment agreement as drafted by Merrill Lynch, the constitution and rules of the New York Stock Exchange constitute a part of that employment agreement given the parties relationship to the exchange. The scope of the arbitration provisions in these rules and the constitution is even broader than the provisions in the Account Executive Training Agreement and Account Executive Agreement entered into by the parties.

> Section 2 of the Arbitration Act, 9 U.S.C. Section 2 (1970), makes enforceable all arbitration agreements concerning transactions relating to commerce . . . Article VIII, Section 1 of the New York Stock Exchange Constitution provides:
>
> Any controversy between parties who are members, allied members, member firms or member corporations shall, at the instance of any such party, and any controversy between a non-member firm or member corporation arising out of the business of such member, allied member, member firm or member corporation, . . . shall, at the instance of such non-member, be submitted for arbitration, in accordance with the provisions of the Constitution and the rules of the Board of Governors.

Coenen v. R. W. Pressprich & Co., 453 F.2d 1209, 1211 (2d Cir. 1972), cert. denied, 406 U.S. 949, 92 S.Ct. 2045, 32 L.Ed.2d 337 (1972).

> The constitution and rules of a stock exchange constitute a contract between all members of the exchange with each other and with the exchange itself. . . . Since the rules of the Exchange 'constitute a contract between the members, the arbitration provisions which they embody have contractual validity.' * * * The Exchange provisions requiring arbitration constitute an agreement to arbitrate which is binding upon both [parties].

Brown v. Gilligan, Will & Co., 287 F.Supp. 766, 769-770 (S.D. N.Y. 1968).

The counts and allegations pled by Merrill Lynch are set out in the second paragraph of this opinion. At oral argument, Merrill Lynch argued emphatically that three of the counts were non-arbitrable because they did not

"arise out of employment or termination of employment." In "count three" Merrill Lynch alleged a cause of action against Smith Barney for "unjust enrichment." No authority was cited recognizing unjust enrichment as a cause of action and our research has yielded none. Quantum meruit is recognized as a cause of action designed to prevent unjust enrichment. Even if "unjust enrichment" were a cause of action we believe it would come within the scope of the constitution and rules of the New York Stock Exchange. Merrill Lynch has not seriously contended that the constitution and rules of the New York Stock Exchange are not applicable to the controversy before us. The trial judge found all the matters pled subject to arbitration. He did not articulate whether he believed them arbitrable pursuant to the parties agreement or the constitution and rules of the New York Stock Exchange. Thus given the applicability of the parties Account Executive Agreement, Account Executive Training Agreement and the rules and constitution of the New York Stock Exchange (particularly Article VIII), we hold that the trial judge did not abuse his discretion in determining that each count pled by Merrill Lynch was subject to arbitration. We find support for our decision in the following cases; *Wichmann v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 726 F.2d 1286 (8th Cir. 1984), *Downing v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 725 F.2d 192 (2nd Circuit 1984), *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Thompson, et al.*, 574 F.Supp. 1372 (E.D. Mo. 1983). *Smith v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 575 F.Supp. 904 (N.D. Tex. 1983) (order denying preliminary injunction). Appellant's first point of error is overruled.

[2-4] In its second and fifth points of error, Merrill Lynch claims the trial court erred in denying its application for temporary injunction because the trial court believed it was without legal authority to issue a temporary injunction. At oral argument both parties argued the issue as to whether the trial judge was correct in denying Merrill Lynch's application for temporary injunction *pending arbitration*. The record shows that Merrill Lynch prayed for "a Temporary Injunction pending final trial herein, or until August 9, 1984, whichever date comes first . . . That the Court upon final hearing, make permanent the temporary Injunction. . . ." *A temporary injunction pending arbitration was never prayed for by Merrill Lynch,* either in the alternative or by amended petition, thus we question whether the issue is properly before us on appeal. Obviously, the trial court could not grant relief not prayed for. However, in light of the fact the trial court in its Order Denying Temporary Injunction stated "this Court therefore lacks authority to grant a temporary injunction pending arbitration," we will address the issue. The Federal Arbitration Act, 9 U.S.C. §§ 3-4 (1976), is instructive in this matter.

> § 3. Stay of proceedings where issue therein referable to arbitration.
>
> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for

> the stay is not in default in proceeding with such arbitration.
>
> § 4
>
> . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

The statute's terms are mandatory and the policy behind having arbitration policy in the first place is that once the arbitration procedure is started it should be speedy and not subject to delay and obstruction in the courts. *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 404, 87 S.Ct. 1801, 1806, 18 L.Ed. 2d 1270 (1967). At oral argument, appellant strenuously defended his position that the language in § 3 "stay the trial" should not be read so as to prevent a trial court from conducting an evidentiary hearing for the purposes of ruling on an application for temporary injunction. We are unpersuaded that such a narrow reading of the word "trial" was intended. As we read the statute, the trial court is obliged to conduct a very narrow two step inquiry. First, it must determine whether a written agreement to arbitrate the subject matter of the present dispute exists between the parties. Second, if such an agreement exists, the court then addresses the question of whether the agreement has been breached. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, ____U.S. ____, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). See also *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Thompson, et al.*, 574 F.Supp. 1472 (E.D. Mo. 1983). While we are not bound by the decisions of the United States Dis-

trict Courts or even the United States Courts of Appeal, we have read numerous recent opinions in these courts which have dealt with issues similar if not exactly the same as those before us. In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. DeCaro,* 577 F.Supp. 616 (W.D. Mo. 1983) the court was presented with the issue of "whether the language, 'shall . . . stay the trial of action,' contained in section three, is limited only to a trial on the merits or whether it prohibits all further proceedings before the Court." Merrill Lynch argued in that case as it did before the trial judge here and continues to argue to us that if a temporary injunction is not entered nothing will be left to arbitrate. In denying the application for temporary injunction without an evidentiary hearing, the court in *DeCaro* remarked

> The merits of an arbitrable dispute are for the arbitrator to decide. A court, however, in ruling on a motion for preliminary injunction must consider the merits of the movant's claim and his chances for success. The Court's findings in this regard along with findings in relation to the other factors to be considered would be cited by the parties and could interfere with the arbitrator's independent determination of the issues.

See also *Wichmann v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 726 F.2d 1286 (8th Cir. 1984). We agree with the reasoning contained in the above cases. The trial court was correct in denying Merrill Lynch's application for temporary injunction without conducting an evidentiary hearing. Appellant's second and fifth points of error are overruled.

[5] Merrill Lynch, in its fourth point of error, contends the trial court was without authority under the

Federal Arbitration Act to compel arbitration. While the statute does not by name authorize the state courts to enforce its provisions, Texas courts have enforced arbitration agreements falling within the Federal Arbitration Act. *White-Weld & Company, Inc. v. Mosser,* 587 S.W. 2d 485, 488 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.), *Miller v. Puritan Fashions Corp.,* 516 S.W.2d 234 (Tex. Civ. App.—Waco 1974, writ ref'd n.r.e.), *Mamlin v. Susan Thomas, Inc.,* 490 S.W.2d 634, 637 (Tex. Civ. App.—Dallas 1973, no writ).

Merrill Lynch's argument has been raised and rejected in other jurisdictions as well. In *Episcopal Housing Corp. v. Federal Ins. Co.,* 269 S.C. 631, 239 S.E.2d 647, 652 (1977) the Supreme Court of South Carolina made the following disposition:

> Accordingly, the petition of the plaintiff EHC to enjoin further proceedings in arbitration are denied, and the temporary stays against further proceedings in arbitration are dissolved. The petitions of both Lafaye and McCrory to proceed with arbitration are granted, . . . and all further proceedings in this court are stayed until arbitration is ended.

The court held the Federal Arbitration Act superceded South Carolina common law and was enforceable in the state courts. In *Youmans v. Dist. Ct. In & For City of Denver,* 197 Colo. 28, 589 P.2d 487, 488 (1979) the Colorado Supreme Court sitting en banc made the following decision:

> The question before us is whether a member of the NYSE can compel a non-member registered representative of the NYSE to arbitrate a controversy between them arising out of the employment or

termination of employment of the registered representative by the member. We answer affirmatively.

See also *Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 67 Cal. App. 3d 19, 136 Cal. Rptr. 378, 380-381 (1977). We note that the United States Supreme Court has not expressly resolved the question. In *Southland Corp. v. Keating*, ____U.S.____, 104 S.Ct. 852, 79 L.Ed. 2d 1 (1984), the court reversed the Supreme Court of California and held that the Federal Arbitration Act preempted a state law withdrawing the power to enforce arbitration agreements. It is clear that the issue of arbitrability is governed by a body of substantive federal law applicable in both state and federal court. "Moreover, state courts, as much as federal courts, are obliged to grant stays of litigation under § 3 of the Arbitration Act. It is less clear, however, whether the same is true of an order to compel arbitration under § 4 of the Act." *Moses E. Cone Memorial Hosp. v. Mercury Construction Corp.*, ____U.S.____, 103 S.Ct. 927, 942, 74 L.Ed.2d 765 (1983). While the United States Supreme Court has yet to be presented with a fact situation requiring it to expressly hold that § 4 applies to state court proceedings, we believe it would be illogical to have a court empowered to deny injunctive relief and grant stays of litigation, yet be powerless to compel arbitration. We hold that the trial court had the power to compel arbitration under the Federal Act. Point of error number four is overruled.

[6] In its third point of error, Merrill Lynch complains of the trial court's "considering unreported case authority for its legal conclusions and authority, and in allowing appellees to cite such authority." Tex. R. Civ. P. 452(f), the applicable rule, provides: "Unpublished opin-

ions shall not be cited as authority by counsel or by a court." The rule is silent as to whether it is intended to prohibit citations to all unpublished opinions or only unpublished opinions of the courts of appeals. The rule is contained in Part III, Rules of Procedure for the Courts of Civil Appeal. We note there is no such corresponding federal rule. The rule is also silent as to the appropriate sanction for a violation. In *Berry v. Berry*, 647 S.W.2d 945, 947 (Tex. 1983), the Texas Supreme Court stated: "Part II, the unpublished portion of the opinion, is of no precedential value and should not be cited." We assume the court there simply refused to consider the unpublished opinion. In the case before us, although unreported (and not to be reported) case authority was cited, we find no evidence that the trial court in any way based its decision or even considered the unreported cases cited. Merrill Lynch's third point of error is overruled.

The judgment of the trial court is affirmed.

APPENDIX C

COURT OF APPEALS
14th Supreme Judicial District
1307 San Jacinto, 11th Floor
Houston, Texas 77002

March 8, 1984

Hon. Kelly J. Coghlan
Vinson & Elkins
3215 First City Tower
Houston TX 77002

Hon. Mark C. Watler
Woodard, Hall & Primm
4700 Texas Commerce Tower
Houston TX 77002

RE: CASE NO. 14-83-00731-CV TRIAL COURT CASE NO. 83-61472

STYLE: Merrill Lynch, Pierce, Fenner & Smith, Inc.
V: McCollum, Ernest M., et al

Please be advised that, on this date, the Court OVERRULED appellant's(s') motion for rehearing in the above cause.

Further, application for writ of error, if any, must be submitted on or before Monday, April 9, 1984.

Respectfully yours,

Mary Jane Smart, Clerk

By: /s/ CHARLENE MITCHELL
Deputy

APPENDIX D

NO. 83-61472

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
333RD JUDICIAL DISTRICT

MERRILL LYNCH, PIERCE,
FENNER & SMITH, INC.

v.

ERNEST M. McCOLLUM AND
SMITH BARNEY, HARRIS UPHAM
& COMPANY, INC.

ORDER DENYING TEMPORARY INJUNCTION

BE IT REMEMBERED that the 25th day of October, 1983, came on for hearing Plaintiff's Application for Temporary Injunction. Due notice having been given, and all parties having appeared by and through counsel, the Court convened the hearing, and Plaintiff and Defendants announced ready. At such time and prior to any evidence being presented, the Court announced that after reading the briefs and examining all of the pleadings and other documents on file, the Court was of the opinion that all of the matters contained in Plaintiff's First Amended Original Petition and Plaintiff's First Supplemental Petition to Plaintiff's First Amended Petition were subject to arbitration and, therefore, as a matter of law, the Court must deny Plaintiff's Application for Temporary Injunction, notwithstanding any evidence that might have been presented at the temporary injunction hearing, and the Court hereby so holds.

Immediately after the Court's announcement, Plaintiff moved to put on evidence in support of Plaintiff's Application for a Temporary Injunction. The Court denied Plaintiff's motion to go forward with evidence. The Plaintiff's counsel was allowed to make an offer of proof pursuant to Rule 103, Texas Rules of Evidence, as to what the testimony would have been had the Court allowed Plaintiff's evidence. The Court is of the opinion, and so holds, that if the Plaintiff's evidence at the temporary injunction hearing had been in accordance with Plaintiff's offer of proof, Plaintiff would have thereby made a prima facie case for the issuance of a temporary injunction. Even if Plaintiff had demonstrated by actual evidence all elements normally necessary to support the issuance of a temporary injunction, the Court nevertheless could not issue a temporary injunction under the Court's holding that all matters at issue in this action are subject to arbitration. The Court announced at the hearing and so holds that as a matter of law all of the actions brought by Plaintiff against Ernest M. McCollum and Smith Barney, Harris Upham & Company, Inc. are subject to arbitration, and this Court therefore lacks authority to grant a temporary injunction pending arbitration.

It is therefore,

ORDERED, ADJUDGED and DECREED that Plaintiff's Application for a Temporary Injunction is denied.

SIGNED this 25th day of October, 1983. 2:14 p.m.

/s/ DAVIE WILSON
Judge Presiding

APPENDIX E

NO. 83-61472

IN THE DISTRICT COURT OF
HARRIS COUNTY, T E X A S
333RD JUDICIAL DISTRICT

MERRILL LYNCH, PIERCE, FENNER
& SMITH, INC.

v.

ERNEST M. McCOLLUM AND
SMITH BARNEY, HARRIS UPHAM &
COMPANY, INC.

ORDER COMPELLING ARBITRATION
AND STAYING CASE

BE IT REMEMBERED that on October 25, 1983, came on for hearing Defendant's Plea in Abatement and Motion to Compel Arbitration. The Court, after considering the Motion, the arguments of counsel, the pleadings, and all documents on file, is of the opinion that all of the matters in Plaintiff's pleadings are matters that must be arbitrated and are matters which this Court therefore has no authority to decide, and that all further proceedings in this action must be stayed pending arbitration.

It is therefore,

ORDERED, ADJUDGED and DECREED that the parties hereto are compelled to arbitrate the disputes existing between them that are contained in the pleadings on file in this case. It is further,

ORDERED, ADJUDGED and DECREED that the above-styled and numbered cause is hereby stayed pending arbitration.

SIGNED this 31st day of Oct., 1983.

/s/ DAVIE WILSON
Judge Presiding

APPROVED AS TO FORM AND SUBSTANCE:

WOODARD, HALL & PRIMM

By: /s/ MARK C. WATLER
Mark C. Watler
Texas Bar No. 20931300

4700 Texas Commerce Tower
Houston, Texas 77002
(713) 221-3800

APPROVED AS TO FORM ONLY:

VINSON & ELKINS

By: _____
Mr. Kelly J. Coghlan
Texas Bar No. 04506300

3215 First City Tower
Houston, Texas 77002
(713) 651-2796

APPENDIX F

Statutory Provisions Involved

Title 9—Arbitration, United States Code

§ 2. Validity, irrevocability and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, of an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

(July 30, 1947, ch. 392, 61 Stat. 670.)

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

(July 30, 1947, ch. 392, 61 Stat. 670.)

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

(July 30, 1947, ch. 392, 61 Stat. 671; Sept. 3, 1954, ch. 1263, § 19, 68 Stat. 1233.)

Vernon's Annotated Texas Statutes

Art. 235. Applications to courts and the effect thereof; court proceedings on applications to courts; venue thereof; stay of proceedings in another court pursuant to a later application; what the court may require that an application contain; when applications may be filed in advance of or pending or at or after the conclusion of arbitration proceedings; acquisition of jurisdiction over adverse parties by service of process or in rem by ancillary proceedings; court relief in aid of pending or prospective arbitration proceedings or the enforcement of court orders or decrees or satisfaction of court judgments; court hearings on applications

. . . .

Sec. G. In advance of the institution of any arbitration proceedings, but in aid thereof, an application may be filed for order or orders to be entered by the court, including but not limited to applications: . . . (ii) invoking the jurisdiction of the court over the controversy in rem, by attachment, garnishment, sequestration, or any other ancillary proceeding in the manner by which, and on complying with the conditions under which, such proceedings may be instituted and conducted ancillary to a civil action in a district court; or (iii) seeking to restrain or enjoin the destruction of the subject matter of the controversy

or any essential part thereof, or the destruction or alteration of books, records, documents, or evidence needed for the arbitration proceeding, or seeking from the court in its discretion, order for deposition or depositions needed in advance of the commencement of the arbitration proceedings for discovery, for perpetuation of testimony or for evidence; . . . .

Article 4642. 4643, 2989 Grounds for

Judges of the district and county courts shall, in term time or vacation, hear and determine applications for and may grant writs of injunction returnable to said courts in the following cases:

1. Where the applicant is entitled to the relief demanded and such relief or any part thereof requires the restraint of some act prejudicial to him.

2. Where a party does some act respecting the subject of pending litigation or threatens or is about to do some act or is procuring or suffering the same to be done in violation of the rights of the applicant when said act would tend to render judgment ineffectual.

3. Where the applicant shows himself entitled thereto under the principles of equity, and the provisions of the statutes of this State relating to the granting of injunctions.

4. Where a cloud would be put on the title of real estate being sold under an execution against a party having no interest in such real estate subject to the execution at the time of the sale, or irreparable injury to real estate or personal property is threatened, irrespective of any legal remedy at law. Acts. 1907, p. 206; Acts 1909, p. 354; Const., Art 5, secs. 8, 16.